The Conciliation Commissioner filed a verified answer to the objections of respondent to the account [O. R. p. 26, P. R. p. 13]. The answer did not deny the allegations that the petitioner had full knowledge of the chattel mortgage and that no notice of the disbursements of any of the funds was given creditors, but sought to justify the expenditures upon the ground that the items paid were necessary for "the protection of said premises" and also that certain disbursements were made on the order of D. W. Richards, Referee in Bankruptcy. No copy of any such order was referred to in the answer or introduced at the hearing upon the account.

A hearing was had before the District Court upon the account and the objections thereto and the court made a minute order overruling the objections and settling the account [O. R. p. 31, P. R. p. 16]. This is the order from which the appeal was taken and which was reversed by the Circuit Court of Appeals.

The proceedings in which the accounting was rendered by petitioner were dismissed October 14, 1935. Petitioner states it is *apparent* that they were dismissed because the statute under which they were pending was unconstitutional [Pet. pp. 4, 17]. This is not the fact. The petition upon which the order of dismissal was based [P. R. pp. 70, 72], shows that objections were made by respondent to the proceedings under Subsection (s) of Section 75 of the Bankruptcy Act upon the ground that the debtor had failed to file a good faith proposal for a composition or extension with his creditors prior to filing the amended

petition under subsection (s). The referee found this to be true and ordered the proceedings dismissed for that reason [P. R. p. 74]. This finding and order was incorporated in the petition to dismiss and made the basis for the motion before the judge [P. R. p. 75] upon which the order of dismissal was made [P. R. p. 76].

On March 16, 1936, Andrea Cuccia, the debtor filed a petition in the District Court asking leave to file a new petition under Section 75 of the Bankruptcy Act, [P. R. p. 77], and an order was made granting leave to file a new petition under that section and restraining respondent and the sheriff from dispossessing the debtor [P. R. p. 79] pending the hearing thereof. The petition for leave to refile shows on its face that *after* the dismissal of the original proceeding the land belonging to the debtor had been sold at foreclosure sale and the creditor (respondent) had secured a judgment for possession of the property and alleged, among other things, that the debtor had "discovered new facts and evidence" which led him to believe that he could now make a composition with his creditors.

This respondent appealed to the Circuit Court of Appeals for the Ninth Circuit from the restraining order of March 16, 1936, [P. R. p. 79], and the Circuit Court by an opinion rendered May 4, 1937, dismissed the appeal upon the ground that it had not been allowed under Section 24b of the Bankruptcy Act, the opinion being printed in the advance sheets of the Federal Reporter at 90 F. (2d) 100. This is the opinion relied upon by petitioner

to establish his contention that the *original* proceedings of Andrea Cuccia under Section 75 of the Bankruptcy Act, in which the accounting which is now before the court was rendered, were *reinstated* and the entire case validated *ab initio* (Pet. Br. pp. 17, 18, 20, 21, 24). The Circuit Court of Appeals, however, granted a rehearing in the case of *Bank of America National Trust and Savings Association v. Andrea Cuccia,* 90 F. (2d) 100, on July 1, 1937, (See Advance Sheet Vol. 90 F. (2d) No. 2, p. VII Rehearing table). A further decision was rendered December 30, 1937, eliminating the statement that the proceedings were reinstated.

The petition for leave to refile under Section 75 of the Bankruptcy Act [P. R. p. 77] and the order granting leave to refile [P. R. p. 79], were made part of the record by stipulation, [P. R. p. 67] and are the only documents or pleadings upon which petitioner may rely to support his contention that the original proceedings were reinstated.

It should also be noted that while leave to refile under Section 75 of the Bankruptcy Act was granted on March 16, 1936, the objections filed by respondent to the accounting made in the *original* proceedings were not filed until June 12, 1936, [O. R. p. 19; P. R. p. 9], and the answer of petitioner to the objections was filed July 13, 1936 [O. R. p. 26; P. R. p. 13], some four months later. The defense now claimed that the original proceedings were reinstated was not pleaded nor raised in the trial court. [See answer, O. R. p. 26; P. R. p. 13.]

Summary of the Argument.

Point One. The only question involved is the sufficiency of the accounting filed by petitioner. This court is not concerned with the alleged reinstatement nor with the provisions of the present statute.

Point Two. Respondent as the holder of a mortgage upon crops of the farmer debtor was entitled to all of the proceeds of the sale of those crops.

Point Three. Conciliation Commissioner was not a trustee in bankruptcy and was not authorized to take possession nor to expend any part of funds received from the sale of crops subject to mortgage. By usurping the functions of a trustee in bankruptcy and disbursing funds of the estate without a valid order he rendered himself personally liable.

Point Four. After adjudication under subsection (s) of section 75 of the Bankruptcy Act the Conciliation Commissioner no longer had jurisdiction of the proceedings for any purpose.

Point Five. Moneys for which petitioner was surcharged were not expended in labor performed and expenses incurred in cultivating and harvesting the mortgaged crop.

Point Six. The provisions of section 75 of the Bankruptcy Act do not permit of the appropriation of a portion of the security of any creditor for the benefit of the bankrupt or other creditors.

Point One.

The Only Question Involved is the Sufficiency of the Accounting Filed by Petitioner. This Court is not Concerned with the Alleged Reinstatement nor with the Provisions of the Present Statute.

The disbursements for which petitioner was charged by the decision of the Circuit Court of Appeals were made between September, 1934, and June 1, 1935, while he was acting as a Conciliation Commissioner under section 75 of the Bankruptcy Act (47 Stat. 1470, c. 204, sec. 1; 48 Stat. 925, c. 424, secs. 8, 9; 48 Stat. 1289, c. 869). From August 4, 1934, to January 7, 1935, the proceedings were pending under section 75, subsections (a) to (r) [O. R. p. 34; P. R. p. 18], and from January 7, 1935, until October 14, 1935, were pending under subsection (s) of section 75 as enacted June 28, 1934 (48 Stat. 1289, c. 869).

After receiving the funds claimed by respondent, on September 26, 1934, the petitioner disbursed the same from time to time until June 1, 1935. The correctness and validity of these disbursements, as shown by his accounting, is the sole matter in dispute. The money was received and disbursed by petitioner *prior to the enactment* of the amended subsection (s) of section 75 of the Bankruptcy Act on August 28, 1935 (49 Stat. 942-945, c. 792). The propriety of the disbursements must be determined by the law as it existed at the time they were made.

Petitioner recognizes this most elementary principle and seeks to avoid it by claiming that the original proceedings were reinstated (Pet. Br. p. 21). As we have heretofore pointed out (*ante*, pp. 6, 7, 8) there is no basis in the record for this contention.

Point Two.

Respondent as the Holder of a Mortgage upon Crops of the Farmer Debtor was Entitled to All of the Proceeds of the Sale of Those Crops.

Respondent's claim to the funds received and disbursed by the petitioner was by reason of a validly-executed crop mortgage, executed by the debtor more than a year prior to the bankruptcy petition [O. R. p. 50; P. R. p. 28]. It is respondent's contention that upon the sale of the crops the security was liquidated and the respondent, as mortgagee, became entitled to the proceeds of the sale.

Section 2955 of the Civil Code of California provides, in part:

> "Mortgages may be made upon all growing crops, including grapes and fruit . . ."

Under the terms of the crop mortgage executed by Andrea Cuccia, the bankrupt in these proceedings, respondent was given a lien upon all crops of grapes standing, planted or grown, or that might be grown, during the years 1933 and 1934, or any subsequent year prior to payment in full of the indebtedness secured by the mortgage [O. R. pp. 50, 51; P. R. pp. 28, 29].

Among other things the mortgagor, by the terms of the mortgage, promised and agreed "to attend to, care for, cultivate, irrigate and protect said crop or crops hereinabove mentioned and described, in a good, farmer-like manner and according to the most approved methods of farming, until the same shall be ready for harvesting, and then to harvest and prepare said crop or crops for market, and when said crop or crops are so prepared, *to deliver said crop or crops to the mortgagee,* who may sell and

dispose of the said crops at the then market price and apply the proceeds of said sale toward payment of the notes and obligations secured thereby, and that the lien of this mortgage shall attach to said crop or crops after the same have been severed and until the amounts secured hereby have been paid in full;" [O. R. pp. 57, 58; P. R. p. 33].

The bank did not consent to the removal of the crops by the Conciliation Commissioner and in fact had brought an action to foreclose the chattel mortgage and the entries in the Conciliation Commissioner's docket [Creditor's Exhibit No. 1, O. R. p. 34; P. R. p. 18] show that a complaint to foreclose the crop and chattel mortgage was filed and summons served. Except for the bankruptcy proceedings the debtor, the Conciliation Commissioner and the purchaser of the crops would be liable to respondent in damages for conversion of the crops upon which respondent held the mortgage.

Campodonico v. Santa Maria Bean and Grain Co., 86 Cal. App. 339, 260 Pac. 830;

Hammels v. Sentous, 151 Cal. 520, 91 Pac. 327.

Under ordinary bankruptcy proceedings there would be no doubt whatever of respondent's right to receive the proceeds of the sale of the crops constituting a part of the security for the indebtedness due to respondent. Section 57(h) of the Bankruptcy Act [App. p. iv] provides that the value of securities held by a secured creditor shall be determined by converting them into money and the amount of such value applied upon the debt and a dividend paid only upon the unpaid balance. Section 65(a) of the Bankruptcy Act (July 1, 1898, 30 Stat. 564, ch. 541, sec.

66 (U. S. Code, title 11, sec. 106)) provides that "Dividends of an equal percentum shall be declared upon all allowed claims, except such as have priority *or are secured.*" Under well-established bankruptcy practice summary process will lie to compel the trustee in bankruptcy to deliver property in his possession to the person entitled thereto. (*Remington on Bankruptcy*, section 2446.)

Petitioner concedes this to be the law prior to the enactment of section 75 of the Bankruptcy Act (Pet. Br. pp. 30, 31), but claims that the new statute alters the rights of the parties. It is respondent's contention that, under the facts of this case, the fundamental right of a secured creditor has not been changed by the new statute.

Section 75 of the Bankruptcy Act (July 1, 1898, c. 541, sec. 75, as added Mar. 3, 1933, c. 204, sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, secs. 1-6, 49 Stat. 942-945 (U. S. C. A. 11, sec. 203)), subsections (a) to (r), inclusive, gives a farmer debtor an opportunity to reach a composition or extension with his creditors. The sole purpose of the statute is to afford an opportunity for the farmer debtor to reach an *agreement* with his creditors. If the required number and amount of creditors *agree* to a plan of composition or extension it may be confirmed by the judge. If sufficient creditors do not agree, then the proceedings may be dismissed or the debtor may file an amended petition under subsection (s) of section 75 of the Bankruptcy Act.

Subsection (o) of section 75 of the Bankruptcy Act provides that after the filing of the petition certain proceedings for the enforcement of any liens against property of the bankrupt shall be stayed pending the disposition of the petition. Subsection (n) of section 75, as it existed at the time of the filing of these proceedings, provides as follows:

> "The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers and duties of its officers, the duties of the farmer, and *the rights and liabilities of creditors,* and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, *shall be the same as if a voluntary petition for adjudication had been filed* and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

Subsection (e) of section 75 provided, in part, as follows:

> "After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

There is nothing in these sections indicating any change in the fundamental rule that a creditor is entitled to his security and to have the proceeds of the sale of the security applied on account of the indebtedness and, in fact, the

statute expressly provides in subsection (n) that the rights of the creditors shall be the same as in a voluntary bankruptcy. The statute goes further, however. It expressly provides that no composition or extension shall reduce the amount of or impair the lien of any secured creditor. Subsection (k) provides as follows:

> "Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby; provided, that such composition or extension *shall not reduce the amount of nor impair the lien* of any secured creditor, but shall affect only the time and method of its liquidation."

The simple facts are these: Respondent had a lien, by way of crop mortgage, upon specific personal property, a crop of grapes growing upon land of the debtor. The crop was sold and at that moment the security was *liquidated.* The use of the proceeds of the sale for any purpose other than payment of the debt secured constituted a *taking* of the security from the respondent directly contrary to the provisions of subsection (k) and the elementary rules of bankruptcy procedure.

Not only does the statute itself prevent impairment of a lien, but this court has held that the Congress does not have the power under the Constitution to enact legislation which would permit any substantial impairment of a mortgagee's security.

> *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854;
>
> *Wright v. Vinton Branch of the Mountain Trust Bank,* 300 U. S. 440, 81 L. Ed. 736, 57 S. Ct. 556.

In the case last cited this court held that the statute might act upon the *remedy* of the mortgagee and to a reasonable extent impose limitations upon the right of the mortgagee to exercise the powers granted to him by the contract. There is nothing in this court's opinion, however, which would indicate that it is permissible to confiscate a portion or all of the *physical property* which constitutes the security so that it is completely and irrevocably lost to the creditor. The taking of a portion of the proceeds of the sale of a specific crop is no different than if the debtor were allowed to sell a part of his land free of the lien of a mortgage and apply the sales price to raising crops on other lands. The statute itself prohibits such a taking.

There are apparently no reported decisions bearing directly upon the point involved herein. Subsection (i) of section 74 of the Bankruptcy Act (Mar. 3, 1933, 47 Stat. 1467, ch. 204, sec. 1; June 7, 1934, 48 Stat. ch. 424, sec. 2; 11 U. S. C. A. 202) is identical to subsection (k) of section 75 and has been held to prevent any reduction or impairment of the lien of a secured creditor.

In re Sterba (C. C. A. 7), 74 Fed. (2d) 413;

In re Iversen (C. C. A. 7), 85 Fed. (2d) 159.

Respondent was the holder of a mortgage upon specific property. When that property was sold by the petitioner the security was liquidated and respondent, as holder of the mortgage, became entitled to the proceeds.

Point Three.

Conciliation Commissioner was not a Trustee in Bankruptcy and was not Authorized to Take Possession nor to Expend any Part of Funds Received from the Sale of Crops Subject to Mortgage. By Usurping the Functions of a Trustee in Bankruptcy and Disbursing Funds of the Estate Without a Valid Order He Rendered Himself Personally Liable.

Petitioner complains in his second specification of error that the court below erred in holding him personally liable for the funds disbursed upon the theory that he was an officer of the court and in some respects similar to a receiver, who would not be liable for disbursing funds pursuant to an order of court, even if the order was erroneous.

The record here shows that the petitioner, the Conciliation Commissioner for the County of San Bernardino, directed the harvesting of crops growing upon the land of the debtor which were subject to a crop mortgage to appellant [O. R. p. 17; P. R. p. 8]. In other words, the Conciliation Commissioner, while a referee in bankruptcy, took into his personal possession property belonging to the bankrupt but subject to a valid chattel mortgage to a creditor, sold the property and deposited the proceeds in a bank account subject to withdrawal by a check signed by himself and the debtor. In so doing the Conciliation Commissioner usurped the functions of a trustee in bankruptcy.

Section 33 of the Bankruptcy Act (July 1, 1898, 30 Stat. 555, ch. 541, sec. 33, 11 U. S. C. A. 61) creates two offices to provide for the administration of its provisions, namely, the office of referee and the office of trustee. The jurisdictions, duties, rights and liabilities of these two

officers are clearly defined by the provisions of the Bankruptcy Act itself.

The referee has *jurisdiction* to hear and determine the rights of the parties and to exercise the powers of a court of bankruptcy (Bankruptcy Act, secs. 38, 39; 30 Stat. 555; 11 U. S. C. A. 66, 67; Rule XII of the General Order in Bankrutcy, 288 U. S. 623). [See App. pp. i, ii, v.] On the other hand, it is the duty of the trustee to take *possession* of the assets of the bankrupt and to administer them pursuant to the provisions of the Bankruptcy Act and the orders of the court (Bankruptcy Act, sec. 47; 30 Stat. 557, ch. 541, sec. 47; 32 Stat. 799, ch. 487, sec. 10; 36 Stat. 840, ch. 412, sec. 8; 11 U. S. C. A. 75). [See App. p. iii.]

Subsection (a) of section 75 of the Bankruptcy Act provides, in part:

> "* * * every court of bankruptcy * * * shall appoint one or more referees to be known as 'conciliation commissioners'."

General Order L of the Supreme Court of the United States, section 11 (288 U. S. 623), provides as follows:

> "In so far as is consistent with the provisions of section 75 of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section. A supervisory conciliation commissioner, if appointed, shall exercise such supervision and control over the conduct of proceedings by conciliation commissioners as the judge may from time to time direct."

It is clear that, under the statute and under the General Orders of the Supreme Court, the Conciliation Commissioner is a referee in bankruptcy and the limit of his authority is the authority vested in a referee in bankruptcy by the Bankruptcy Act itself and by the General Orders of the Supreme Court and the rules of the United States District Court for the Southern District of California.

The word "jurisdiction" has a definite meaning in the law and is generally defined as "the authority or power which a man has to do justice in causes of complaint brought before him; the power and authority to declare the law". (35 *C. J.* 426.)

In the matter of *In re McMurray,* 8 Fed. Supp. 449, one of the questions before the court was whether or not the Conciliation Commissioner has power to hold real estate of the debtor for the purpose of administration. In that case the District Court for the Southern District of Iowa pointed out that the provisions in subsection (n) of section 75 giving the court jurisdiction of the farmer and his property has to do with the jurisdiction of the court *to declare the law and not with the possession or control of the property itself.*

See, also:

In re Wiedmer (C. C. A. 7), 82 Fed. (2d) 566.

At the time petitioner, as Conciliation Commissioner, took possession and sold the crops of the debtor and received and disbursed the proceeds he was not a trustee

in bankruptcy but was, under the provisions of the statute and the General Orders of the Supreme Court, a referee. As a referee in bankruptcy he had absolutely no authority to take possession and sell and disburse the proceeds of personal property of the bankrupt upon which respondent had a valid lien.

A trustee who is regularly appointed and qualified is accountable for his disbursement of the funds of the bankrupt's estate. (Bankruptcy Act, sec. 47; 30 Stat. 557.) He is only permitted to withdraw funds from the depositary upon the counter-signature of the judge or referee designated for that purpose. [General Order in Bankruptcy XXIX, App. p. vi.] If a trustee pays out funds without a proper order of court or pursuant to an order of court made without proper notice, he becomes personally liable therefor.

Re Rude, 101 Fed. 805;
Re Cadenas & Co., 178 Fed. 158;
Re Hoyt and Mitchell, 127 Fed. 968;
Re Howard, 130 Fed. 1004;
Re Schwartz, 4 Fed. (2d) 895;
Remington on Bankruptcy, secs. 1131, 1123.

A fortiori one who, without such appointment, usurps the functions and duties of a trustee should be held at least to the same degree of accountability.

The record shows that no notice of the disbursement of any of the funds was given to respondent or any creditor [O. R. p. 43; P. R. pp. 23, 24], and it is con-

ceded that no order was made authorizing petitioner to make the disbursements to Cuccia (Pet. Br. p. 26).

Petitioner argues, however, that the decision of the Circuit Court of Appeals was not based upon the lack of an order. This is not correct. One of the specifications of error urged upon the appeal was that no valid order authorizing any expenditure of money was ever made [O. R. p. 76; P. R. p. 45]. The Circuit Court in its opinion stated respondent's objections to the order settling the account as follows [O. R. p. 94; P. R. p. 60]:

> "Appellant objected to appellee's account, on the ground that appellant was entitled to the entire proceeds of the mortgaged crop, and that the disbursements made by appellee were made without appellant's knowledge or consent and were *unauthorized* and *improper*."

And, in stating its conclusion, the court said [O. R. p. 95; P. R. p. 61]:

> "Appellee therefore could not be and *was not authorized* or empowered to pay Cuccia, with appellant's money, for performing this obligation."

The record is clear that the petitioner, rather than confining his activities to the scope of his jurisdiction as a referee, usurped the functions of a trustee in bankruptcy, took possession of funds belonging to a secured creditor and paid them out without complying with the provisions of the Bankruptcy Act and General Orders in Bankruptcy and without securing any order of court and that he should, therefore, be personally liable as a trustee in bankruptcy would be under the same circumstances.

Point Four.

After Adjudication under Subsection (s) of Section 75 of the Bankruptcy Act the Conciliation Commissioner no Longer had Jurisdiction of the Proceedings for any Purpose.

There is one other angle to this case which affects only a portion of the money involved. After the debtor filed his petition under section 75 of the Bankruptcy Act the proceedings were referred to the petitioner as Conciliation Commissioner, the crops were sold and the proceeds received by him and a portion of them were disbursed. On January 7, 1935, the debtor filed an amended petition under subsection (s) of section 75 of the Bankruptcy Act and, after an adjudication, the proceedings were referred to D. W. Richards, referee in bankruptcy for San Bernardino county [O. R. p. 36; P. R. p. 19]. These proceedings were conducted prior to the 1935 amendment to subsection (s) of section 75, which provides that after the filing of an amended petition under subsection (s) the Conciliation Commissioner shall continue to act as referee until the case has finally been disposed of. Upon the filing of the amended petition on January 7, 1935, the petitioner, as Conciliation Commissioner, lost all jurisdiction of these proceedings, but, nevertheless, *continued thereafter to hold and disburse the money.* He testified at the hearing that he thought that he was named trustee [O. R. p. 39; P. R. p. 21], but the transcript of the

referee's docket [Creditor's Exhibit No. 1, O. R. pp. 34-38; P. R. pp. 18-20] does not show that any trustee was ever elected at a creditor's meeting. In fact the transcript shows that at the first meeting of creditors respondent objected to the jurisdiction of the court and made a motion to dismiss the proceedings, which was subsequently granted by the referee [O. R. p. 37; P. R. p. 19].

It is clear that after the jurisdiction of this case passed from the Conciliation Commissioner to the referee in bankruptcy there is no possible justification for the continued possession and disbursement of the money by the Conciliation Commissioner without a proper court order authorizing such disbursement.

Point Five.

Moneys for which Petitioner was Surcharged were not Expended in Labor Performed and Expenses Incurred in Cultivating and Harvesting the Mortgaged Crop.

The Circuit Court of Appeals stated in its opinion [O. R. p. 94; P. R. p. 60] that the account showed the sum of $1290.33 had been paid to Cuccia for labor performed and expenses incurred in cultivating and harvesting the mortgaged crop. This statement is not borne out by the record, as we will show, but apparently the Circuit Court was of the opinion that it was immaterial for what purpose the moneys had been disbursed. Petitioner, however, has seized upon this statement as a basis for all of his argument upon the fourth specification of error (Pet. Br. p. 27) and substantially all of the argument upon the fifth specification of error. The argument is, in brief, that the cost of creating the fund should be charged to it and that the proceeds of the sale of crops should be charged with the expense of production of those crops.

The record does not show that $1290.33 was expended in cultivating and harvesting the mortgaged crop. The account filed by petitioner [O. R. p. 17; P. R. p. 8] shows the receipt of $1437.37 on September 26, 1934. Petitioner's answer to the objections to the account [O. R. p. 26; P. R. p. 13] admits that the money was received from a sale of the crop of grapes harvested in September, 1934. It must be remembered that the petition was filed in August, 1934, and the grapes to be harvested in September were certainly in existence at the time of filing the petition.

The answer further alleges [O. R. p. 26; P. R. p. 13]:

> "That said Bank of America claims a crop mortgage upon said premises covering crops for the years 1934 and 1935 and for the protection of said premises and said crops it is absolutely necessary that *said vineyard* on said land be attended to and all the items paid for labor and living expenses of the debtor and feed for his horses were absolutely necessary to be paid *in order to have said vineyard properly attended to.* That the money paid to the debtor was no advancement for his personal benefit, but as pay for his work, and the amount advanced him for feed for his horses and living expense was less than the payment to him of ordinary wages for the work which he actually and necessarily performed in the care of the crop and *for the preservation of the vineyard and future crops thereon* for the benefit of creditors and lien claimed by said Bank of America thereon.
>
> That said debtor did not have any other means for his living expenses and therefore could not have performed said work without getting his feed."

The answer does not allege that any part of the proceeds of the crop were used in the cultivation or harvesting of the crop in September of 1934. Rather, it alleges that the money was used in the care of the *vineyard* on the land so that *future* crops might be obtained. Other than the one disbursement on September 26, 1934, of $340.00, which we will discuss separately, all of the money was paid out during a *period of nine months subsequent to the sale of the crop in September of 1934.* The 1934 crop having been *harvested and sold* in September, money disbursed after that date could not possibly have been ex-

pended in the cultivation or harvesting of *that crop,* and there is absolutely nothing in the record to indicate that it was. On the contrary, the record shows conclusively that the money was expended in the care of the *land,* payment of living expenses of the debtor, and costs and expenses of administration.

Expenses of administration are, by the terms of the statute, not chargeable to any creditor. Subsection (b) of section 75 provides, in part:

> "No fees, costs or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided." (47 Stat. 1471, 11 U. S. C. A. 203.)

The item of $340.00 above referred to was disbursed on September 26, 1934. The explanation in the account is as follows [O. R. p. 17; P. R. p. 8]:

> "Cash, labor, for 20 men on ranch
> Court order issued $340.00."

The petitioner testified on direct examination [O. R. p. 39; P. R. p. 21] that he paid the money to Cuccia and directed him to pay the others. On cross-examination by the judge he said that he paid for the picking of the grapes $403.00 [O. R. p. 48; P. R. p. 26]. This is the only testimony in the entire record indicating that any part of the money received from the sale of the crop was used to pay the expense of harvesting the crop.

The Circuit Court of Appeals based its decision upon the provisions of the crop mortgage. This mortgage provides, as heretofore pointed out (*ante*, p. 11) that the mortgagor shall harvest and prepare the crop for market and then deliver the crop to the mortgagee. As stated by the Circuit Court [O. R. p. 95; P. R. p. 61]:

> "Appellant (respondent) was under no obligation to cultivate or harvest the crop or to pay Cuccia for doing so. *Cuccia was expressly obligated to do these things himself, at his own expense.* No conciliation commissioner, trustee, referee, judge or court could impose this obligation on appellant. Appellee, therefore, could not be and was not authorized or empowered to pay Cuccia, with appellant's money, for performing this obligation. What appellee could or should have done had Cuccia failed to perform this obligation it is unnecessary to decide, since there was, in fact, no such failure." (Italics ours.)

The petitioner did not himself contract for and pay the items represented by the $340.00 payment, but the obligations were incurred by Cuccia and the money paid to him. As far as Cuccia was concerned, it was his obligation to harvest the crop. There is no justification for the use of funds belonging to the crop mortgagee to satisfy an indebtedness incurred by the bankrupt after the filing of the petition.

Petitioner argues in his fourth specification of error that the disbursements made were to *produce* the crop and therefore should have been deducted from the proceeds of the sale and cites cases to the effect that expenses

incurred in creating a fund should ordinarily be paid out of the fund.

We have pointed out that the disbursements, with a possible exception of $340.00, were not made in the cultivation or harvesting of the crop because they were made after the crop was harvested and sold. The cases cited by petitioner are not comparable to the facts of the present case. The situation here is more nearly a sale free of liens by a trustee in bankruptcy. The petitioner, usurping the functions of a trustee, took possession of specific personal property subject to a valid lien and sold it, receiving the proceeds into his possession. The debt secured was $4934.68 after the sale of the *real* property [O. R. p. 22; P. R. p. 11] and the crop itself was, of course, worth much less than the amount of the debt.

The rule is well established that when a trustee in bankruptcy takes possession of property subject to a valid lien and sells the same free of liens without the assent of the secured creditor the creditor is entitled to full payment of the debt, without deduction of any costs, expenses, fees or commissions.

Re Harralson (C. C. A. 8), 179 Fed. 490;

Re Holmes Lumber Co., 189 Fed. 178, 181;

Re Cutler & John, 228 Fed. 771, 773;

Re Plantations Co., 270 Fed. 273;

Re Westmoreland, 4 Fed. (2d) 602;

Robertson v. Goree (C. C. A. 5), 29 Fed. (2d) 261.

Point Six.

The Provisions of Section 75 of the Bankruptcy Act do not Permit of the Appropriation of a Portion of the Security of any Creditor for the Benefit of the Bankrupt or Other Creditors.

Under Point One of our argument we urged that the facts of this case do not involve an interpretation of subsection (s) of section 75 of the Bankruptcy Act as amended August 28, 1935 (49 Stat. 942-945), for the reason that the facts under which the case arose occurred prior to its enactment. Petitioner's fifth specification of error and the one apparently upon which he principally relies is directed entirely to this amended statute and, in the event that the court should consider the point, we feel that we should address some argument in reply.

The substance of petitioner's argument is that proceedings under subsection (s) of section 75 are analogous to receivership proceedings, that a receiver operating a going concern is permitted to divert revenue from operations to pay operating expenses and that, therefore, a farmer operating his farm should be entitled to take proceeds of crops subject to a crop mortgage to pay for the operation of the farm. Petitioner makes the further startling statement that every conciliation commissioner in the state, when confronted with a crop mortgage has been obliged to "appropriate" at least a portion of the proceeds of the sale of the crops to pay the expense of its production.

As we have pointed out, *in this case,* the money was not disbursed in the cultivation of the crop and the argument does not apply.

As an abstract proposition, however, petitioner's argument is not sound. It may be, as petitioner asserts, that

in a given case a farmer would be unable to obtain relief under the statute by reason of the fact that the crops being mortgaged he would be unable to obtain funds to operate the property. That, however, appears to be a matter to be addressed to the discretion of the Congress. This court is concerned only with an interpretation of the statute as it now exists.

One of the principal objections to the original subsection (s) of section 75 was that it took away the right of the mortgagee to retain his lien until the indebtedness was paid in full. In *Wright v. Vinton Branch Mountain Trust Bank,* 300 U. S. 440, 81 L. Ed. 736, 57 S. Ct. 736, this court held that this objection to the original statute had been removed by the amended statute. The court said (p. 458):

> "Third. It is not denied that the new act adequately preserves three of the five above-enumerated rights of a mortgagee. 'The right to retain the lien until the indebtedness thereby secured is paid' is specifically covered by the provisions in paragraph 1, that the debtor's possession, 'under the supervision and control of the court,' shall be 'subject to all existing mortgages, liens, pledges, or encumbrances,' and that:
>
> 'All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.'"

Under this section of the statute there appears to be no room for argument. A creditor holding a mortgage upon a growing crop has a lien upon specific property.

If that property is sold the lien would attach to the proceeds. The statute says that such an existing lien shall remain in *full force and effect* and the property covered by such lien shall be *subject to the payment of the claim of the secured creditor.* When the property has been reduced to money what can be done except apply the money upon the debt? Would the money be held "subject to the payment of the claim" if it was expended to meet other obligations of the debtor? Does the statute contemplate that the debtor be allowed to remain in possession of the *money* and pay rental therefor? Obviously not. The provision that the property shall be subject to the *payment* of the claim can only mean that when the property had been liquidated the secured claim shall be paid.

Petitioner argues that this court, in the *Wright* case, approved the provisions of the statute authorizing the debtor to remain in possession of his property and requiring the payment of rental. The argument does not fit the facts. No purpose would be served by allowing the debtor to remain in possession of a crop of grapes, nor would any reasonable person suggest that the debtor should pay any rental for such possession. The provisions of the statute for possession and payment of rental clearly do not apply to crops after they are harvested.

A further argument of petitioner is that the proceeds of the crop should be used to pay for the expense of the production of the crop. The argument does not bear analysis. Suppose the debtor mortgaged his crop for $1000.00 and then filed a proceeding under section 75 of the Bankruptcy Act. Thereafter suppose that it should be necessary to borrow or incur debts of an additional $1000.00 in order to produce and harvest the crop, which ultimately sold for $1000.00. If petitioner's theory is

correct, then the indebtedness created *after* the filing of the bankruptcy proceeding, even though it did not *purport* to be secured by a lien upon any specific property, would be paid out of the proceeds of the sale of specific mortgaged property before payment of the mortgage.

There is no reason or authority for such a proposition. Even though the subsequent loans were *actually secured* by a mortgage upon the crops the original mortgage would have a prior lien. The universal rule is that liens upon the same property have priority according to the time of their creation. In the State of California the rule is stated in section 2897 of the Civil Code as follows:

> "2897. Priority of liens. Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia."

Petitioner concedes that his argument cannot be sustained under any theory of bankruptcy practice or any provision of the Bankruptcy Act other than section 75. It must also be conceded that there is no express provision in section 75 which would authorize the appropriation of any part of the proceeds of the sale of mortgaged property prior to payment in full of the debt secured thereby. Petitioner does not claim the right by reason of anything in the statute, but contends that because a proceeding under section 75 is *similar* to a receivership to the extent that it seeks to restrain enforcement of liens to give the farmer an opportunity to rehabilitate himself, the farmer, as his own receiver, should have the rights and powers of an equity receiver.

It would appear that regardless of the similarity of *purpose*, the powers, rights and duties of a farmer and his creditors under section 75 must be determined by the provisions of the statute under which the proceedings are pending. But assuming for the purpose of argument that a farmer debtor was vested with the powers of an equity receiver, the petitioner's contention would still be unsound. Petitioner has not cited any authority holding that a receiver may sell specific property, which is subject to the lien of a mortgage, and apply the proceeds of the sale to anything except payment of the debt secured thereby. No such authority exists. A receiver, as a trustee in bankruptcy, takes the property *subject to existing liens* (*Clark on Receivers,* Vol. I, sec. 269). It is true that under certain circumstances a receiver may, by order of court, create liens which will have priority over existing liens, but the court in which the proceedings are pending does not have general authority to displace existing liens (*Kneeland v. American Loan and Trust Co.,* 136 U. S. 89, 34 L. Ed. 379, 10 S. Ct. 950; *Clark on Receivers,* Vol. I, sec. 477). Such liens can only be created upon order of court after notice to lienholders (*Lockport Felt Co. v. United Box etc, Co.,* 74 N. J. Eq. 686, 70 Atl. 980; *Quincy etc. R. Co. v. Humphreys,* 145 U. S. 82, 36 L. Ed. 632, 12 S. Ct. 787; *Clark on Receivers,* Vol. I, sec. 477a).

We believe that upon reason and authority there is absolutely no basis to support petitioner's contention that a farmer after filing a petition under section 75 of the Bankruptcy Act should be permitted to disregard a valid crop mortage executed prior to bankruptcy and to use the words of petitioner, "appropriate" a portion of the proceeds of the sale of the security.

Conclusion.

We respectfully urge that for the reasons and upon the authorities herein cited the decision of the Circuit Court of Appeals is a correct statement of the law applicable to the facts of the case and that it should be affirmed.

Respectfully submitted,

WILLIAM C. DAY,
Counsel for Respondent.

LOUIS FERRARI,
EDMUND NELSON,
HUGO A. STEINMEYER,
Of Counsel.

APPENDIX.

Bankruptcy Act of 1898.

Sec. 38. Jurisdiction of Referees.—(a) Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) during the examination of the bankrupt, or other proceedings, authorize the employment of stenographers for reporting and transcribing the proceedings at such reasonable expense to the estate as the court may fix. (July 1, 1898, 30 Stat. at L. 555, ch. 541, sec. 38; May 27, 1926, 44 Stat. at L. 662, ch. 406, sec. 12 (U. S. Code, title 11, sec. 66).)

Sec. 39. Duties of Referees.—(a) Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estate in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerk the records, herein required to be kept by them. when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them, when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

(b) Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy. (July 1, 1898, 30 Stat. at L. 555, ch. 541, sec. 39 (U. S. Code, title 11, sec. 67).)

Sec. 47. Duties of Trustees.—(a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied (as amended June 25, 1910); (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and

file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

(c) The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings. (July 1, 1898, 30 Stat. at L. 557, ch. 541, sec. 47; Feb. 5, 1903, 32 Stat. at L. 799, ch. 487, sec. 10; June 25, 1910, 36 Stat. at L. 840, ch. 412, sec. 8 (U. S. Code, title 11, sec. 75).)

Sec. 57. Proof and Allowance of Claims.—(h) The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such se-

curities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. (July 1, 1898, 30 Stat. at L. 544, ch. 541, sec. 57; Feb. 5, 1903, 32 Stat at L. 797, ch. 487, sec. 12; May 27, 1926, 44 Stat. at L. 662, ch. 406, sec. 13 (U. S. Code, title 11, sec. 93).)

General Orders In Bankruptcy.

Adopted and Established by the Supreme Court of the United States November 28, 1898, as Amended April 17, 1933

Supreme Court of the United States.

XII.

Duties of Referee.

1. The order referring a case to a referee shall name a day upon which the bankrupt or debtor shall attend before the referee, and from that day the bankrupt or debtor shall be subject to the orders of the court in all matters relating to the proceedings, and may receive from the referee a protection against arrest to continue, unless suspended or vacated by order of the court, until the final adjudication on his application for a discharge or for the confirmation of a composition or extension proposal. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee.

XXIX.

Payment of Moneys Deposited.

No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks. This general order shall not apply to proceedings under section 77 of the Act.

P. 2

SUPREME COURT OF THE UNITED STATES.

No. 365.—October Term, 1937.

Noah Adair, Petitioner, *vs.* Bank of America National Trust and Savings Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 28, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

This writ was asked to review a decree of the Circuit Court of Appeals for the Ninth Circuit, upholding the objections and exceptions of the respondent, a creditor, to the final account of petitioner, a conciliation commissioner appointed under Section 75 (a) of the Bankruptcy Act, and reversing the order of the District Court which had settled and allowed the account. The Circuit Court of Appeals held that the petitioner should have been required to pay to respondent the gross proceeds of the grape crop harvested on the debtor's land after the debtor had filed his petition under Section 75 of the Bankruptcy Act, without any deduction for moneys spent in harvesting that crop and for other purposes, because of the fact that the crop was subject to a chattel mortgage held by respondent. 90 F. (2d) 750. In view of the importance of the question with respect to proceedings instituted under Section 75 of the Bankruptcy Act, this Court granted certiorari, — U. S —.

On August 6, 1934, Andrea Cuccia, a farmer, filed an adequate petition under Section 75 (a) to (r) of the Bankruptcy Act, showing by the schedules secured claims to respondent of over $12,000 and unsecured claims of a slightly larger amount, and expressing his desire to effect a composition or extension of time to pay his debts. His petition was referred to Noah Adair, the Conciliation Commissioner for the County of San Bernardino, California. On January 7, 1935, an amended petition was filed by the debtor, stating that he had failed to obtain the approval of his creditors to a composition or extension proposal and praying that he might be adjudged a bankrupt under the provisions of Section 75, subsection (s) of the Bankruptcy Act, as enacted June 28, 1934. Adjudication was entered and the pro-

ceedings referred to the Referee in Bankruptcy. On October 14, 1935, the District Court, on a motion by the respondent, dismissed the petition. On March 16, 1936, the debtor attempted to invoke the benefits of the amended Section 75(s), but we are not here concerned with that petition and the subsequent proceedings (set out in *Bank of America National Trust & Savings Ass'n* v. *Cuccia*, decided December 30, 1937, on rehearing, by the Circuit Court of Appeals for the Ninth Circuit).

The respondent, at the beginning of and throughout the proceedings, held a matured note of the debtor and his wife, secured by a deed of trust on certain lands in the County of San Bernardino, California, and by a mortgage on the crops growing or to be grown on the same lands, during 1933 and 1934, or prior to the payment in full of the total indebtedness. The crop mortgage required the mortgagor to cultivate, harvest and deliver the crop to the mortgagee, without cost to the mortgagee, for sale and application of the proceeds to the debt.

The present controversy had its origin in the respondent's petition to the Court, on February 6, 1936, for an accounting by the conciliation commissioner of funds realized from crops sold off the debtor's premises in 1934. In response to the order of the District Court, the conciliation commissioner made an accounting as appears in the footnote.[1] The Bank objected to the account on

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[1] Account—Filed February 17, 1936

September 26, 1934—An account in the name of Andrea Cuccia and Noah Adair was opened with the American National Bank, San Bernardino, California, and a deposit of $1437.37 was made	$1,437.37
September 26, 1934—Cash, labor, for 20 men on ranch Court Order issued*	340.00
October 1, 1934—Andrea Cuccia	59.33
October 30, 1934—Andrea Cuccia, 14 days labor Court order issued	42.00
November 27, 1934—Andrew Cuccia, $15. living expense $20. filing fee under 75(s) and $20. feed for horse. Court order	55.00
December 20, 1934—Andrea Cuccia, $10. feed for horse and $10. living expense	20.00
January 22, 1935—Andrea Cuccia, $20. and labor on grove $144.00	164.00
[fol. 18] January 22, 1935—D. W. Richards indemnity fee under Section 75(s)	18.25
February 1, 1935—Andrea Cuccia, labor, 8 men, 11 days each	264.00
February 15, 1935—Andrea Cuccia labor	90.00
March 15, 1935—Andrea Cuccia, $45. labor; $20. hay and $10. living expense	75.00
April 19, 1935—Jos. E. Rich, Court Reporter	22.50
April 19, 1935—Ralph W. Eckhardt, attorneys fee	50.00
April 19, 1935—Andrea Cuccia, 37 days work of hired men	111.00
May 11, 1935—Andrea Cuccia, sulphur for grapes	60.00
June 1, 1935—Andrea Cuccia, labor for two man working in grapes	30.00
Total	$1,401.08
Tax, etc.	.60
	$1,401.68

Balance in bank to date, $35.69.

*[The "court order" refers to an order entered by petitioner himself. The only order entered by the District Court as to these expenditures was its order of approval of the account filed by petitioner.]

the ground that the money was the proceeds of the sale of a crop covered by the chattel mortgage above referred to and that the disbursements from the fund were made without valid order by the District Court and without the Bank's notice or knowledge of any court order. It was further objected that after adjudication in bankruptcy under Section 75(s) the conciliation commissioner had no jurisdiction. Petitioner stated in his answer and testimony that the items appearing prior to the adjudication in bankruptcy of January 7, 1935, were disbursed, on his orders as conciliation commissioner, either to gather the 1934 crop or to provide for care of the property, and that the items appearing from January 22 through June 1, 1935, were disbursed under the direction of the referee in bankruptcy. The District Court, finding that the expenditures of the conciliation commissioner were made in good faith and for the purpose of conserving the estate, settled and allowed the account. The Circuit Court of Appeals directed the disallowance of the account and the payment by the conciliation commissioner to the respondent of the gross proceeds of the mortgaged crop.

First. The powers granted by the bankruptcy clause of the Constitution, Article 1, § 8, cl. 4, are not limited to the bankruptcy law and practice in force in England or the States at the time of its adoption. *Continental Illinois Nat'l Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry. Co.*, 294 U. S. 648, 668. Then the interests of the creditor alone were protected. Progressive liberalization of bankruptcy and insolvency laws, in an effort to avert the evils of liquidation, has furnished opportunity for composition in bankruptcy proceedings and later for composition and extension of debts in relief proceedings for individual debtors, for reorganization of railroads and other corporations, and for public debtor proceedings.[2]

Section 75 of the Bankruptcy Act[3] provides similar opportunities for the rehabilitation of farmers. *Wright* v. *Vinton Branch,*

[2] Bankruptcy Act of 1867, as amended by the Act of 1874, c. 390, § 17, 18 Stat. 178, 182; Act of March 3, 1933, c. 204, 47 Stat. 1467; Act of June 7, 1934, c. 424, 48 Stat. 911; Act of June 28, 1934, c. 869, 48 Stat. 1289; Act of April 10, 1936, c. 186, 49 Stat. 1198; Act of April 11, 1936, c. 216, 49 Stat. 1203, Act of August 16, 1937.

[3] Subsections (a) to (r) were added by the Act of March 3, 1933, c. 204, § 31, 47 Stat. 1470-1473, and subsections (a) and (b) amended by the Act of June 7, 1934, c. 424, §§ 8 and 9, 48 Stat. 911, 925. Subsection (s), the first Frazier-Lemke Act, was added June 28, 1934, c. 869, 48 Stat. 1289. Subsequent to the decision in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, various subsections, including (s), were amended by the new Frazier-Lemke Act, August 28, 1935, c. 792, 49 Stat. 942.

300 U. S. 440, 456. It is sought to accomplish this rehabilitation through composition or extension of debts, subsections (e) to (l). On failure of composition and extension, further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession of his property, under conditions favorable to its ultimate redemption by him. These steps are carried out under judicial supervision, subsection (s).[4]

To accomplish its purpose, Section 75 provides that the filing of a petition shall effect a stay.[5] Such a stay under judicial discretion as to enforcement of claims does not take property without due process and is constitutional. *Continental Illinois Nat'l Bank and*

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[4] Subsection (s) in effect at the institution of this proceeding for the relief of a debtor was held unconstitutional in Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555. The new subsection (s) was approved in Wright *v.* Vinton Branch, 300 U. S. 440.

[5] Subsection (o) of Sec. 75 (which has never been amended) provides:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

[6] These subsections, as originally enacted, read:

"(e) . . . After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

"(n) The filing of a petition pleading for relief under this section, shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

Subsection (e) has never been amended. Subsection (n) was amended, in respects not material here, by the Act of August 28, 1935, c. 792, 49 Stat. 942.

Trust Co. v. *Chicago, Rock Island and Pacific Ry. Co., supra,* at pages 675 *et seq.* and 680 *et seq.; Wright* v. *Vinton Branch, supra,* 460; *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398. In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n)* for the exercise by the court of "such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors." These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act.

Second. In holding the conciliation commissioner personally liable, we think the lower court misconceived the nature of his office. At the time of filing the original petition for composition and extension, August 6, 1934, Section 75 of the Bankruptcy Act was comprised of subsections (a) to (s) inclusive. Subsections (a) to (r) made provision for conciliation commissioners, set up the same qualifications for eligibility to this office as are required for the office of referee, authorized the conciliation commissioners to receive and transmit the petitions and schedules, to call the first meeting of creditors, with notice of terms of composition or extension, to hear the parties in interest, to prepare final inventory, to supervise the farmer's affairs during an extension period and to distribute the consideration after a composition. In accordance with Section 75, subsection (b), this Court, as of April 24, 1933, established Rule L, governing proceedings under Section 75, (a) to (r) inclusive, as an addition to the General Orders in Bankruptcy, 288 U. S. at 641. Rule L provided for reference to the conciliation commissioner, and his carrying out of the duties outlined above. The commissioner was given, in so far as consistent with Section 75 and Rule L, "all the powers and duties of a referee in bankruptcy," to be carried out under the General Orders in Bankruptcy. Rule L (11). Sections 38 and 39 of the Bankruptcy Act and subsections 3 and 6 of Rule L indicate the wide extent of the authority of the conciliation commissioner. Under Section 38, Bankruptcy Act, clause four, the referee is empowered to "perform such part of the duties, except as to questions arising out of the applications

of bankrupts for compositions or discharges as are by this Act conferred on courts of bankruptcy . . . "[7]

In view of the foregoing the conciliation commissioner had the authority, prior to the adjudication of bankruptcy under Section 75(s), to act as the "court", in the first instance and subject to review, in controlling the property of the debtor "in the best interests of the farmer and his creditors." Sec. 75 (e). *In re Wiedmer,* 82 F. (2d) 566. Under this authority the conciliation commissioner acted in authorizing the expenditures shown on the account for gathering the crop of 1934, preparing for the crop of 1935, and paying fees and expenses. It is plain that the conciliation commissioner, like the referee (*White* v. *Schloerb,* 178 U. S. 542, 546; *Mueller* v. *Nugent,* 184 U. S. 1, 13) exercises some of the "judicial authority" of the bankruptcy court. The acts just detailed were judicial acts. Error within his jurisdiction does not subject him to personal liability. *Randall* v. *Brigham,* 7 Wall. 523, 535. See also *Bradley* v. *Fisher,* 13 Wall. 335; *Alzua* v. *Johnson,* 231 U. S. 106; *Yaselli* v. *Goff,* 275 U. S. 503. Cf. *First Nat'l Bank of Ardmore* v. *Bonner,* 74 F. (2d) 139, 142; *United States* v. *Ward,* 257 Fed. 372, 377. This doctrine is quite clear when, as here, no rule or positive enactment was violated and the acts were bona fide.

The fact that the proceeds of the crop were banked to the joint account of the debtor and the conciliation commissioner may have obscured the judicial character of the latter. Better practice would suggest that the account appear in the name of the debtor, with the counter-signature of the conciliation commissioner required for withdrawals. Also, at an early, preferably the first, meeting of creditors, the method of handling the business of the debtor pending confirmation or further order should have been developed and proper orders entered. Cf. Section 12 (a), Bankruptcy Act. This

[7] "Applications of bankrupts for compositions", as used in this clause, does not refer to proceedings of debtor for rehabilitation under Section 75. And even under Section 12, the referee has authority to proceed with steps preliminary to the application for confirmation of the composition proposal. Cf. General Order XII, paragraph 3; In re Bloodworth-Stembridge Co., 178 Fed. 372.

Rule 77 of the District Court for the Southern District of California reads as follows: "Rule 77.—Jurisdiction of Referees. It is ordered that the Referees in Bankruptcy of said Court be, and they are hereby vested with jurisdiction in all bankruptcy cases within the limits of their respective counties, to perform all the duties conferred on Courts of Bankruptcy, which Referees may be required or authorized to perform; except as otherwise provided by General Order in Bankruptcy No. XII."

does not appear to have been done. These irregularities do not suffice to withdraw from the conciliation commissioner his judicial protection. *Alzua* v. *Johnson,* 231 U. S. 106.

Some disbursements were made after the adjudication in bankruptcy under subsection (s) and the reference of the proceedings to a referee in bankruptcy. It is unnecessary to decide whether, under Section 75(s) as originally enacted, the conciliation commissioner could have continued to act as referee. In this case, there was no further reference of the proceedings to petitioner, and he continued to act solely at the direction of the referee in bankruptcy. His uncontradicted testimony was as follows:

"When this matter was referred to D. W. Richards, as referee I wanted him to take the money I had on hand and become the custodian of it. He asked me to keep the money and said he would trust me in the expenditure of the money while it was under him and that he would O. K. the checks, so all the checks that were written after it went to D. W. Richards were O. K.'d by him and I wrote the checks at his request."

Without determining the effect of the unconstitutionality of subsection (s) upon the steps taken under its authority, it appears that the petitioner acted either judicially, continuing to exercise his powers as conciliation commissioner, or ministerially, as an arm of the court, under the direction and with the approval of the referee. Under the facts of this case we do not think petitioner is personally liable for these disbursements. Cf. *First Nat'l Bank of Ardmore* v. *Bonner,* 74 F. (2d) 139, 142.

Third. Moreover, the expenditures assailed by respondent were proper, at least with respect to the principal items (which are the only ones we shall consider)—the amounts spent in harvesting the 1934 crop, which was sold in order to create the fund, and the amounts spent for preservation of the vineyard and for the cultivation of the 1935 crop. There is no showing that petitioner was improvident. Reference is made in his account to money paid to the farmer as "living expenses", but the record discloses that the amounts paid the debtor did not exceed the ordinary wages for the work he actually and necessarily performed in the maintenance of the vineyard. Compare *Wright* v. *Vinton Branch, supra,* 300 U. S. at 466; *In re Barrow,* 98 Fed. 582.

The court below ruled that under the crop mortgage the farmer had the obligation to cultivate and harvest the crop at his own ex-

pense, and therefore the gross proceeds belonged to respondent. This conclusion disregards the fact that the debtor did not harvest the grapes as an ordinary mortgagor. He had come into court seeking relief under Section 75 of the Bankruptcy Act. The filing of his petition put the property in the control of the court and the harvesting of the crop and the preservation of the property became a matter for the concern and action of the court.

Respondent certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth (cf. *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 455), and the cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund. See *Bronson* v. *La Crosse R. Co.*, 1 Wall. 405, 410; *Shepherd* v. *Pepper*, 133 U. S. 626, 652; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 293; *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 376; *Wright* v. *Vinton Branch, supra*, 300 U. S. at 468. The rule applies even in ordinary bankruptcy proceedings[8] since the secured creditor benefits from the disbursement.[9]

And since the creditor in this case had a lien on the crop for future years and on the real estate, we cannot say that the money expended for maintenance of the real estate and toward production of the 1935 crop was not likewise for its benefit. Compare *Wright* v. *Vinton Branch, supra*, 300 U. S. at 468.[10] Respondent itself has

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[8] Though the court orders a sale free of liens without the consent of the lienholder, the cost of preserving the property is deducted before the proceeds are turned over to him. Norton Jewelry Co. *v.* Hinds, 245 Fed. 341, 343; In re N. Y. & Phila. Package Co., 225 Fed. 219, 224; In re Hansen & Birch, 292 Fed. 898, 899; In re Westmoreland, 4 F. (2d) 602, 603; In re Prince & Walker, 131 Fed. 546, 551; In re Davis, 155 Fed. 671, 673.

[9] See Virginia Securities Corp. *v.* Patrick Orchards, 20 F. (2d) 78, 81; Norton Jewelry Co. *v.* Hinds, 245 Fed. 341, 343; In re Prince & Walker, 131 Fed. 541, 546.

[10] The Court said:

"(c) The disposition of the rental required to be made is said to involve denial of the mortgagee's rights. Paragraph 2 provides:

"'Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear.'

"It is suggested that payment of taxes and keeping the property in repair takes the income from the mortgagee, and that the mortgagor alone may be benefited thereby; that if the mortgagor exercises the option to purchase the property at its appraised value, he will secure the property free of tax liens which otherwise might have accrued against it. But it must be assumed that

suggested, in another connection (see *Bank of America National Trust & Savings Ass'n* v. *Cuccia, supra*), that the grape vines require "cultivation, pruning and care", lest they "deteriorate." It is unnecessary to determine the effect of an expenditure of the proceeds of a crop where the mortgagee has no lien on the property preserved and protected by the expenditures.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McREYNOLDS concurs in the result.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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the mortgagor will not get the property for less than its actual value. The Act provides that upon the creditor's request the property must be reappraised, or sold at public auction; and the mortgagee may by bidding at such sale fully protect his interest. Non-payment of taxes may imperil the title. Payments for upkeep are essential to the preservation of the property. These payments prescribed by the Act are in accordance with the common practice in foreclosure proceedings where the property is in the hands of receivers."